

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

Cr.Jail.Appeal.No.D- 45 of 2018

Cr.Appeal No. D- 46 of 2018

Present:-

Mr. Justice Naimatullah Phulpoto.

Mr. Justice Shamsuddin Abbasi.

Appellant : Sikandar s/o Kirer Khan by caste Jatoi
through Mr. Muhammad Hassan Chandio,
Advocate.

Respondent : The State
through Syed Meeral Shah, A.P.G.

Date of hearing : 09.05.2018

Date of judgment : 09.05.2018

J U D G M E N T

NAIMATULLAH PHULPOTO, J: By this common judgment, we intend to dispose of aforesaid appeals which arise out of one and same judgment. Sikandar Ali s/o Kirer Khan by caste Jatoi appellant was tried by learned Special Judge (Narcotics) Shaheed Benazirabad in Special Case No. 296 of 2016 for offence under Section 9(c) Control of Narcotic Substance Act, 1997. On the conclusion of trial, vide judgment dated 08.03.2018, appellant was convicted u/s 9 (c) of CNS Act, 1997 and sentenced to 03 years RI and to pay fine of Rs.15,000/-. In case of default in payment of fine, appellant was ordered to suffer S.I for 05 months more. Appellant was extended benefit of Section 382-B Cr.P.C.

2. The prosecution case as emerged from the recitals contained in first information report and the evidence adduced during the trial is as under:-

3. Inspector Habib-ur-Rehman Lashari along with his subordinate staff ASI Syed Ibrar Hussain and others left Police Station in the government mobile vide roznamcha entry No.14 on 19.05.2018 at 1600 hours for patrolling duty. While patrolling at different places, Inspector received spy information that accused Sikandar was carrying charas and he was standing at Shoukat Shah water course. Accused was waiting for some conveyance. After receipt of spy information, police party proceeded to the point place and reached there at 1630 hours. Accused was standing there, he was surrounded and caught hold. Due to non-availability of private mashirs, Inspector made ASI Abrar Hussain Shah and HC Ghanwar Khan as mashirs and apprehended the accused. On enquiry, accused disclosed his name as Sikandar s/o Kirer Jatoi r/o Village Punhoon Khan Jatoi. Inspector in presence of mashirs secured a plastic shopper from his possession. It contained two big pieces of charas, pieces of charas were weighed which became 2000 grams. Personal search of the accused was also conducted and cash of Rs. 200 was recovered from his pocket. Charas was sealed at spot. Accused was arrested. Mashirnama of arrest and recovery was prepared. Thereafter, accused and the case property were brought at police station where FIR was lodged against the accused under section 9 (c) of CNS Act, 1997. It was recorded vide Crime No.37/2016 at P.S. Taluka Nawabshah.

4. During investigation charas was sent to the chemical examiner for report on 24.04.2016 through PC Dilbar. Positive report of the chemical

examiner was received. On the conclusion of usual investigation, challan was submitted against the appellant/accused u/s 9 (c) of CNS Act, 1997.

5. Trial Court framed charge against accused at Ex.2, to which he pleaded not guilty and claimed to be tried.

6. At the trial, prosecution examined PW-1 complainant/Inspector Habib-ur-Rehman Lashari at Ex.3, he produced mashirnama of arrest, search and recovery, FIR, attested copy of roznamcha entries and chemical report at Ex.3/A to 3/D, PW-2/mashir ASI Syed Ibrar Shah at Ex.4 and PC Dilbar at Ex.5. Thereafter, prosecution side was closed at Ex.06.

7. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.7 in which he claimed false implication in this case and denied the prosecution allegations. Accused neither examined himself on Oath nor led any evidence in his defence, in disproof of the prosecution allegations.

8. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, by judgment dated 08.03.2018 convicted and sentenced the appellant as stated above.

9. Mr. Muhammad Hassan Chandio, learned advocate for the appellant mainly contended that it was the case of spy information and it was day time incident but Inspector deliberately avoided to associate with him independent persons of the locality. He has further contended that charas was foisted upon accused due to enmity. It is contended that report of the chemical examiner was not prepared according to the

protocol as provided in the rules. He further argued that delay in sending of charas to the chemical examiner has not been explained. It is further contended that safe custody of the charas at police station and its safe transit to the chemical examiner have not been established. Lastly, it is contended that there are material contradictions in the prosecution case which made prosecution case doubtful. In support of his contentions, learned counsel has placed reliance upon the case of Ikramullah and others v. The State (2015 SCMR 1002).

10. Syed Meeral Shah, learned A.P.G, appearing for the State very rightly conceded to legal position that so for the safe custody of charas at Malkhana and it's safe transmission to expert are concerned, the same have not been proved. He did not support the case of prosecution.

11. We have carefully heard learned counsel for the parties and scanned the entire evidence.

12. We have come to the conclusion that the prosecution has failed to prove its' case against the appellant for the reasons that it was the case of spy information but the Inspector Habib-ur-Rehman failed to associate with him any independent and respectable person of locality to witness the recovery proceedings. According to the case of prosecution, charas was recovered from the possession of accused on 19.05.2018 but it was sent to the chemical examiner on 24.05.2018. Delay in despatch to the chemical examiner has not been explained. Safe custody of charas at Malkhana and its safe transit have also not been established. Prosecution failed to produce entry of police station that the recovered narcotics was safely kept in Malkhana. Head Mohrer of Malkhana was also not produced before the court. Learned advocate for the appellant has

referred to the statement of accused recorded u/s 342 Cr.P.C. in which appellant claimed his false implication in this case and stated that the charas has been foisted upon him. In these circumstances, independent corroboration was required. Chemical examiner failed to prepare the report as per protocol as provided in the rules. We have no hesitation to hold that the report of the chemical examiner though positive was deficient in the eyes of law as held in the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, which has been endorsed by the Honourable Supreme Court in the recent judgment in the case of *Nadeem v. The State through Prosecutor General, Sindh, Criminal Appeal No.06-K of 2008 in Criminal Petition No.105-K of 2016, dated 04.04.2018* which reads as follows:-

“According to the FIR the petitioner and his co-convict had tried to escape “with” the motorcycle when they were intercepted by the police party but before the trial court Muhammad Ayub, S.I.P (PW1) had stated that upon seeing the police party the petitioner and his co-convict had started running away while leaving the motorcycle on the road and the engine of that motorcycle had gone off. Muhammad Jaffar, PC (PW2) had also deposed about running away of the petitioner and his co-convict but had kept quiet regarding leaving of the motorcycle by the petitioner and his co-convict while running away. Both the above mentioned witnesses produced by the prosecution, however, unanimously stated that while running away upon seeing the police party the petitioner and his co-convict had kept the relevant bag containing narcotic substance in their hands and it was in that condition that the petitioner and his co-convict had been apprehended by the police party. It is quite obvious that the initial story contained in the FIR had been changed during the trial and the changed story was too unreasonable to be accepted at its face value. Muhammad Ayub, S.I.P. (PW1) had stated before the trial court that after recovering the narcotic substance he had brought the same to the Police Station and it was he who had kept the recovered substance in safe custody whereas he had never claimed to be the Moharrir of the relevant Police Station. The record of the case shows that it was Ghulam Ali, P.C. who had taken the recovered substance to the office of the Chemical Examiner for analysis but it is not denied that the said Ghulam Ali, P.C. had not been produced before the trial court by the prosecution. It is, thus, evident that safe transmission of the recovered substance from the local Police Station to the office of the Chemical Examiner had not

been established by the prosecution. The record further shows that the Chemical Examiner's report adduced in evidence was a deficient report as it did not contain any detail whatsoever of any protocol adopted at the time of chemical analysis of the recovered substance. This Court has already held in the case of fkramullah and others v. The State (2015 SCMR 1002) that such a report of the Chemical Examiner cannot be used for recording conviction of an accused person in a case of this nature. For all these reasons we find that the prosecution had not been able to prove its case against Nadeem petitioner beyond reasonable doubt."

13. We have already held that the safe custody of recovered substances as well as safe transmission of the samples to chemical examiner had not been established by the prosecution. We add that report of the chemical examiner was also legally laconic and deficient as such tampering or replacement while in transit of the narcotics cannot be ruled out. A bare look at the report submitted by the Chemical Examiner in the present case shows that the entire page which was to refer to the relevant protocols and tests was not only substantially kept blank but the same had also been scored off by crossing it from top to bottom. This surely was a complete failure of compliance of the relevant rule and such failure reacted against reliability of the report produced by the prosecution before the learned trial Court. Section 36 of the Control of Narcotic Substances Act, 1997 requires a Government Analyst to whom a sample of the recovered substance is sent for examination to deliver to the person submitting the sample a signed report in quadruplicate in "the prescribed form" and, thus, if the report prepared by him is not prepared in the prescribed manner then it may not qualify to be called a report in the context of section 36 of the Control of Narcotic Substances Act, 1997 so as to be treated as a "conclusive" proof of recovery of narcotic substance from an accused person.

14. In our considered view, prosecution has failed to prove that the charas was in safe custody for the aforementioned period. Even positive report of the chemical examiner would not improve the case of prosecution. Above mentioned circumstances have created reasonable doubt in the prosecution case. It is settled law that it is not necessary that there should many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. In this regard reliance can be placed upon the case of *Tariq Pervez V/s. The State (1995 SCMR 1345)*, wherein the Honourable Supreme Court has observed as follows:-

“It is settled law that it is not necessary that there should many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.”

15. In view of the above, we have no hesitation to hold that the prosecution has failed to prove its' case against the accused. Resultantly, by our short order dated 09.05.2018, both the instant appeals were allowed. Conviction and sentence recorded by the trial court vide judgment dated 08.03.2018 were set aside and appellant was acquitted of the charge. Appellant was in custody, he was directed to be released forthwith, if not required in some other case. There are the reasons of said short order.

JUDGE

JUDGE

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